

The Inflation Equation:  
Corporate Profiteering, Supply Chain Bottlenecks, and COVID-19

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Sandeep Vaheesan  
Legal Director  
Open Markets Institute

My name is Sandeep Vaheesan. I am the Legal Director at the Open Markets Institute. I want to thank Chairwoman Waters, Ranking Member McHenry, and the other members of the Committee for the opportunity to participate in this hearing.

Ongoing inflation in the United States is, in part, a story of corporate pricing power. In industries ranging from agricultural chemicals and seeds to mattresses to rental cars to restaurants, chief executive officers and chief financial officers have boasted that they have been able to raise prices and boost profits and profit margins.<sup>1</sup> Profit margins surged in 2021.<sup>2</sup> Goldman Sachs has identified corporations with pricing power that are poised to do very well in an inflationary environment.<sup>3</sup> This corporate power over prices appears to be an important driver of inflation.

The extraordinary pricing power of corporations in many sectors is a result of policy choices, initiated by the courts in the late 1970s and furthered by President Reagan's administration in the 1980s, that effectively reinterpreted and neutered antitrust law against powerful corporations.<sup>4</sup> In particular, a lax approach to corporate mergers, embraced by both Democratic and Republican administrations, helped create the conditions for our present inflation. For forty years, the Department of Justice (DOJ) and the Federal Trade Commission (FTC) have disregarded the anti-merger law the Congress passed in 1914 and strengthened in 1950 and treated corporate consolidation as generally benign.

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<sup>1</sup> Jeanna Smialek, *Corporations Raise Prices as Consumers Spend 'With a Vengeance'*, N.Y. TIMES, Feb. 27, 2022, <https://www.nytimes.com/2022/02/27/business/economy/price-increases-inflation.html>; Kristin Broughton & Theo Francis, *What Does Inflation Mean for American Businesses? For Some, Bigger Profits*, WALL ST. J., Nov. 14, 2021, <https://www.wsj.com/articles/inflation-yellen-biden-price-increase-cost-shipping-supply-chain-labor-shortage-pandemic-11636934826>.

<sup>2</sup> Ben Werschkul, *Corporate America's 2021 Profits Were Higher than Ever*, YAHOO! NEWS, Feb. 25, 2022, <https://news.yahoo.com/corporate-profits-surge-2021-184717178.html>.

<sup>3</sup> Tanaya Macheel, *This Goldman Pricing-Power Portfolio Could Win If Inflation Stays High*, CNBC, Jan. 27, 2022, <https://www.cnbc.com/2022/01/27/this-goldman-pricing-power-portfolio-could-win-if-inflation-stays-high.html>.

<sup>4</sup> Eleanor M. Fox & Lawrence A. Sullivan, *Antitrust—Retrospective and Prospective: Where Are We Coming From? Where Are We Going?*, 62 N.Y.U. L. REV. 936, 944-955 (1987).

With this implicit greenlight for consolidation, corporations have engaged in hundreds of thousands of mergers and acquisitions over the past four decades. Lax merger policy has enabled corporations in many markets to acquire substantial pricing power.

A permissive posture on mergers has also had deleterious effects on the productive capacity of the United States. Corporations often eliminate “redundant” capacity following mergers, especially those involving competitors, and, in many instances, have opted to grow through mergers and acquisitions instead of the more socially beneficial method of investment and hiring.

The net result is an economy in which corporations in many markets wield exceptional pricing power and have less slack capacity to meet even modest increases in demand for goods and services. These are not the only political economic harms of corporate consolidation and concentration, which include lower wages for workers,<sup>5</sup> but just the ones most relevant to the topic of today’s hearing. The pandemic has merely exposed the underlying structural problems in the American economy.

## I. Forty Years of Lax Anti-Merger Policy

Congress enacted a strong anti-merger measure in Section 7 of the Clayton Act, in response to the corporate merger and acquisition frenzy that occurred in the late 1890s and early 1900s. The members of Congress who debated and drafted the original Section 7 in 1914 and amended the law in 1950 spoke out against the economic and political evils of concentrated corporate power arising from consolidation.<sup>6</sup> For example, Representative Bennett stated that the “greatest value [of Section 7] lies in protecting our citizenry from domination by business interests so large and monopolistic that the voices of average people cannot be heard in their thunder[.]”<sup>7</sup>

Congress wanted to strike at consolidation before it inflicted harm on citizens, workers, suppliers, rivals, and consumers. To put this anti-merger policy into practice, the law prohibits mergers and acquisitions whose effects “may be to substantially lessen competition, or to tend to create a monopoly.”<sup>8</sup> By featuring such probabilistic language, the law was designed to “thwart [harmful mergers] in their incipency.”<sup>9</sup> As the Supreme Court later recognized, “Congress decided to clamp down with vigor on mergers” and “arrest[] a trend toward concentration in its incipency before that trend developed to the point that a market was left in the grip of a few big companies.”<sup>10</sup>

At the same time, Congress took care to ensure that Section 7 did not stifle business growth. Rather, Congress sought to channel business strategy in socially useful directions. The Clayton Act spurred businesses to grow through investment in new plants and facilities and hiring more

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<sup>5</sup> José Azar, Ioana Marinescu & Marshall Steinbaum, *Labor Market Concentration*, J. HUMAN RES. 1218 (2020); Nathan Wilmers, *Wage Stagnation and Buyer Power: How Buyer-Supplier Relations Affect U.S. Workers’ Wages: 1978 to 2014*, 83 AM. SOC. REV. 213 (2018).

<sup>6</sup> Robert H. Lande, *Wealth Transfers as the Original and Primary Concern of Antitrust: The Efficiency Interpretation Challenged*, 34 HASTINGS L.J. 65, 126-142 (1982).

<sup>7</sup> 95 CONG. REC. 11506 (1949).

<sup>8</sup> 15 U.S.C. § 18.

<sup>9</sup> *FTC v. Procter & Gamble Co.*, 386 U.S. 568, 577 (1967).

<sup>10</sup> *United States v. Von’s Grocery Co.*, 384 U.S. 270, 276-77 (1966).

workers—as opposed to growing through the acquisition of existing business assets and corporations. The Supreme Court noted in 1963: “[S]urely one premise of an antimerger statute such as § 7 is that corporate growth by internal expansion is socially preferable to growth by acquisition.”<sup>11</sup>

In 1982, the Reagan administration chose to ignore the text and purpose of the Clayton Act. It radically weakened anti-merger policy in the United States. The DOJ and the FTC under President Reagan substituted their policy judgments for those of Congress. Whereas the Department of Justice in 1968 faithfully followed the law in stating “the primary role of Section 7 enforcement is to preserve and promote market structures conducive to competition,”<sup>12</sup> the Reagan administration’s DOJ sounded a different tone—one that conferred broad discretion on corporate executives and investment banks supporting mergers and acquisitions but conflicted with the law. In the 1982 Merger Guidelines, the DOJ stated, “Although they sometimes harm competition, mergers generally play an important role in a free enterprise economy.”<sup>13</sup> It further pledged “to avoid unnecessary interference with th[e] larger universe of mergers that are either competitively beneficial or neutral.”<sup>14</sup>

During Reagan’s eight years in office, actual merger enforcement, in practice, proved to be even more relaxed than what the new guidelines indicated.<sup>15</sup> The drop in merger investigations and enforcement actions under the Reagan administration was precipitous.<sup>16</sup> As an antitrust scholar and a former FTC commissioner (and future FTC chair) wrote in 1988, the Reagan administration’s dearth of anti-merger enforcement served “as an invitation to [corporate America] to merge with anyone.”<sup>17</sup>

Every subsequent administration up through President Trump followed the Reagan administration’s permissive approach to merger enforcement. Indeed, they have often further loosened restrictions on merger activity. For example, both the Clinton and the Obama administrations raised the market concentration thresholds for when they would challenge mergers among competitors (horizontal mergers).<sup>18</sup> They also recognized an “efficiencies” defense in merger enforcement policy,<sup>19</sup> even though the Supreme Court had unambiguously rejected an efficiencies justification for unlawful mergers. The Court stated in 1967, “Possible economies cannot be used as a defense to illegality.”<sup>20</sup>

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<sup>11</sup> *United States v. Philadelphia National Bank*, 374 U.S. 321, 370 (1963).

<sup>12</sup> U.S. Dep’t of Justice, 1968 Merger Guidelines § 2.

<sup>13</sup> U.S. Dep’t of Justice, 1982 Merger Guidelines § I.

<sup>14</sup> *Id.*

<sup>15</sup> Thomas G. Krattenmaker & Robert Pitofsky, *Antitrust Merger Policy and the Reagan Administration*, 33 ANTITRUST BULL. 211, 226 (1988).

<sup>16</sup> *Id.* at 213.

<sup>17</sup> *Id.* at 228.

<sup>18</sup> U.S. Dep’t of Justice & Fed. Trade Comm’n, 1997 Merger Guidelines § 1.51; U.S. Dep’t of Justice & Fed. Trade Comm’n, Horizontal Merger Guidelines § 5.3 (2010).

<sup>19</sup> U.S. Dep’t of Justice & Fed. Trade Comm’n, 1997 Merger Guidelines § 4; U.S. Dep’t of Justice & Fed. Trade Comm’n, Horizontal Merger Guidelines § 10 (2010).

<sup>20</sup> *Procter & Gamble*, 386 U.S. at 580.

Time and again, presidential administrations have embraced the pro-merger ideology adopted by the Reagan administration. For instance, in their 2010 Horizontal Merger Guidelines, President Obama's DOJ and FTC asserted that "a primary benefit of mergers to the economy is their potential to generate significant efficiencies and thus enhance the merged firm's ability and incentive to compete, which may result in lower prices, improved quality, enhanced service, or new products."<sup>21</sup>

Democratic and Republican administration permitted consolidation despite the lack of evidence to support the twin assumptions that mergers resulted in efficiency, and that powerful corporations willingly shared any of the benefits of efficiency with the public. If anything, the great bulk of evidence pointed in the opposite direction. For instance, in his landmark research on the effects of mergers, economist John Kwoka found that the DOJ and the FTC routinely permitted mergers that led to higher prices for consumers.<sup>22</sup> And as business school professor Melissa Schilling wrote, after reviewing a series of studies of completed mergers, "A considerable body of research concludes that most mergers do not create value for anyone, except perhaps the investment bankers who negotiated the deal."<sup>23</sup>

And benefit the bankers did. Mergers and acquisitions exploded after the Reagan administration's decision to scale back enforcement of the Clayton Act, increasing in dollar value from \$81.2 billion between 1980 and 1984 to \$925.2 billion between 1995 and 1999.<sup>24</sup> In recent times, mergers have only further increased. In 2021 alone, the value of merger activity in the United States was \$2.5 *trillion*.<sup>25</sup>

To get a sense of the level of corporate consolidation and the federal tolerance of this consolidation, consider the number of merger filings and the government's response to them. The members of Congress who in 1976 enacted the notification system for large mergers expected the DOJ and the FTC to receive around 150 merger filings a year.<sup>26</sup> In the 2010s, the DOJ and the FTC received no fewer than 1,166 merger filings in a particular fiscal year.<sup>27</sup> In the calendar year 2021, businesses filed 4,130 merger notifications.<sup>28</sup> The DOJ and the FTC challenge only a miniscule portion of these consolidations. For instance, out of the 1,637 mergers reported to the agencies in the fiscal year 2020, the agencies challenged just 43 of them (15 by

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<sup>21</sup> U.S. Dep't of Justice & Fed. Trade Comm'n, Horizontal Merger Guidelines § 10 (2010).

<sup>22</sup> JOHN KWOKA, *MERGERS, MERGER CONTROL, AND REMEDIES: A RETROSPECTIVE ANALYSIS OF U.S. POLICY* 94 (2015).

<sup>23</sup> Melissa A. Schilling, *Potential Sources of Value from Mergers and Their Indicators*, 63 ANTITRUST BULL. 183, 183 (2018).

<sup>24</sup> F.M. Scherer, *Some Principles for Post-Chicago Antitrust Analysis*, 52 CASE W. L. REV. 5, 11 (2001).

<sup>25</sup> Niket Nishant, *Global M&A Volumes Hit Record High in 2021, Breach \$5 Trillion for First Time*, REUTERS, Dec. 31, 2021, <https://www.reuters.com/markets/us/global-ma-volumes-hit-record-high-2021-breach-5-trillion-first-time-2021-12-31/>.

<sup>26</sup> H.R. REP. NO. 94-1373, at 11 (1976).

<sup>27</sup> FED. TRADE COMM'N & DEP'T OF JUSTICE, HART-SCOTT-RODINO ANNUAL REPORT: FISCAL YEAR 2019, <https://www.ftc.gov/system/files/documents/reports/federal-trade-commission-bureau-competition-department-justice-antitrust-division-hart-scott-rodino/p110014hsrannualreportfy2019.pdf>.

<sup>28</sup> Fed. Trade Comm'n, Premerger Notification Program, <https://www.ftc.gov/enforcement/premerger-notification-program>.

DOJ, 28 by FTC).<sup>29</sup> In many of these cases, the “challenge” did not entail the government stopping the merger in court. Instead, it only involved the merging corporations selling off a line of business or agreeing to terms of fair dealing with their rivals to allay the DOJ or the FTC’s competitive concerns.<sup>30</sup>

The character of merger activity also changed beginning in the early 1980s. Due to strict rules against mergers among rivals and mergers between firms in a potential purchaser-supplier relationship (vertical mergers) in the 1960s, the merger wave of the decade involved firms in unrelated markets and industries (conglomerate mergers).<sup>31</sup> With the loosening of anti-merger law beginning in the Reagan years, mergers increasingly became horizontal and vertical.<sup>32</sup> Some of the proposed and ultimately completed horizontal mergers in recent years have even combined the top two firms in a market, such as Anheuser-Busch InBev and MillerCoors in 2016.<sup>33</sup>

## II. One Link Between Weak Anti-Merger Policy and Inflation: Greater Corporate Pricing Power

One result of this policy choice on mergers is highly concentrated markets and enhanced corporate pricing power. Due to corporate consolidation, markets across the economy have become more concentrated.<sup>34</sup> The signs are everywhere and familiar to Americans. Consolidation in the wireless industry has led to three carriers controlling the national market. Four airlines dominate domestic air travel.

High market concentration can translate to enhanced pricing power for individual corporations. A corporation that has fewer rivals has greater ability to raise prices. Even if it loses some sales from increasing prices, the higher per-unit margin can more than compensate for reduced volumes.<sup>35</sup> This pricing power is on display during the present inflation. On recent earnings calls, executives have touted their firms’ pricing power to investors.<sup>36</sup> While demand did surge for

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<sup>29</sup> FED. TRADE COMM’N & DEP’T OF JUSTICE, HART-SCOTT-RODINO ANNUAL REPORT: FISCAL YEAR 2020 1-3, [https://www.ftc.gov/system/files/documents/reports/hart-scott-rodino-annual-report-fiscal-year-2020/fy2020\\_-\\_hsr\\_annual\\_report\\_-\\_final.pdf](https://www.ftc.gov/system/files/documents/reports/hart-scott-rodino-annual-report-fiscal-year-2020/fy2020_-_hsr_annual_report_-_final.pdf).

<sup>30</sup> See, e.g., Press Release, Fed. Trade Comm’n, FTC Requires Bristol-Myers Squibb Company and Celgene Corporation to Divest Psoriasis Drug Otezla as a Condition of Acquisition (Nov. 15, 2019), <https://www.ftc.gov/news-events/press-releases/2019/11/ftc-requires-bristol-myers-squibb-company-celgene-corporation>.

<sup>31</sup> Dennis C. Mueller, *The Effects of Conglomerate Mergers: A Survey of the Empirical Evidence*, 1 J. BANKING & FIN., 315 (1977).

<sup>32</sup> David J. Ravenscraft, *The 1980s Merger Wave: An Industrial Organization Perspective*, in THE MERGER BOOM 17, 29 (Lynn Elaine Brown & Eric S. Rosengren eds., 1987).

<sup>33</sup> Press Release, Dep’t of Justice, Justice Department Requires Anheuser-Busch InBev to Divest Stake in MillerCoors and Alter Beer Distributor Practices as Part of SABMiller Acquisition (July 20, 2016), <https://www.justice.gov/opa/pr/justice-department-requires-anheuser-busch-inbev-divest-stake-millercoors-and-alter-beer>.

<sup>34</sup> Gustavo Grullon, Yelena Larkin & Roni Michaely, *Are U.S. Industries Becoming More Concentrated?*, 23 J. FIN. 697, 698 (2019).

<sup>35</sup> Nathan H. Miller & Gloria Sheu, *Quantitative Methods for Evaluating the Unilateral Effects of Mergers*, 58 REV. INDUS. ORG. 143 (2021).

<sup>36</sup> Molly Smith & David McLaughlin, *Inflation Risks Getting Sticky as Big Firms Flex Pricing Power*, BLOOMBERG, Jan. 14, 2022, <https://www.bloomberg.com/news/articles/2022-01-14/inflation-risks-getting-sticky-as-big-firms-flex-pricing-power>.

certain goods, leading to bottlenecks in those sectors (such as chips in auto manufacturing), corporations have used the cover of inflation to sustain price hikes that might have initially been caused by supply bottlenecks for key components.<sup>37</sup>

Concentration also means greater market-wide pricing power. With fewer market participants, firms can collude with rivals more easily. Coordinating and maintaining collective price increases becomes simpler as there are fewer sellers to corral into a pricing agreement and monitor compliance.<sup>38</sup> In a market with just three competitors, defection from a collusive arrangement is easier to identify (and punish through retaliatory price cuts) than it is in a market with 15 or 20 competitors.

In highly concentrated markets, firms do not even need to conspire in the proverbial smoke-filled room to collusively raise prices. Instead, they can engage in tacit forms of collusion, in which one firm initiates a price increase and expects or encourages others to follow.<sup>39</sup> Indeed, executives' comments on earnings calls may be signals to rivals that the firm plans to raise prices, as a first mover or follow the lead of others. As a possible example of this pricing coordination among rivals, Goodyear's Chief Financial Officer Darren Wells, on a recent call in which pricing power in tires was a theme, said, "There are nine competitors that we tend to track, and seven out of the nine have announced price increases in the first quarter, and one of the ones who hadn't raised prices right at the end of last year."<sup>40</sup> Critically, courts in the United States have long held that tacit collusion is legal and cannot be challenged under the Sherman Act (one of the main federal antitrust laws).<sup>41</sup>

Meatpacking illustrates the connection between consolidation, concentration, and inflation. The price of meat, poultry, fish, and eggs rose 12.5% between December 2020 and December 2021,<sup>42</sup> and the increase in beef prices, in particular, has been an important contributor to food and overall inflation.<sup>43</sup> Meatpackers have engaged in many mergers and acquisitions since the 1980s.<sup>44</sup> The result is that, in beef, chicken, and pork processing, the top four national firms together have at least a 54% share of each market.<sup>45</sup> This concentration has conferred great pricing power on processors of beef, pork, and poultry. For instance, beef packers raised prices

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<sup>37</sup> Broughton & Francis, *supra* note 1.

<sup>38</sup> Joseph E. Harrington, Jr., *Evaluating Mergers for Coordinated Effects and the Role of "Parallel Accommodating Conduct"*, 78 ANTITRUST L.J. 651 (2013).

<sup>39</sup> Luke Garrod & Matthew Olczak, *Explicit vs Tacit Collusion: The Effects of Firm Numbers and Asymmetries*, 58 INT'L J. INDUS. ORG. 1 (2018).

<sup>40</sup> Smialek, *supra* note 1.

<sup>41</sup> *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 557 (2007); *Theatre Enterprises, Inc. v. Paramount Film Distributing Corp.*, 346 U.S. 537, 541 (1954).

<sup>42</sup> Bureau of Labor Stats., Consumer Price Index: 2021 in Review, <https://www.bls.gov/opub/ted/2022/consumer-price-index-2021-in-review.htm>.

<sup>43</sup> Peter S. Goodman, *Record Beef Prices, but Ranchers Aren't Cashing In*, N.Y. TIMES, Dec. 27, 2021, <https://www.nytimes.com/2021/12/27/business/beef-prices-cattle-ranchers.html>.

<sup>44</sup> Jessica Fu, *Can \$1 Billion Really Fix a Meat Industry Dominated by Just Four Companies?*, COUNTER, Jan. 5, 2022, <https://thecounter.org/big-four-meatpackers-antitrust-consolidation/>.

<sup>45</sup> Mark K. Hendrickson, Philip H. Howard, Emily M. Miller & Douglas H. Constance, *The Food System: Concentration and Its Impacts* 9 (2020), <https://farmaction.us/wp-content/uploads/2020/11/Hendrickson-et-al.-2020.-Concentration-and-Its-Impacts-FINAL.pdf>.

to consumers and held down prices paid to ranchers.<sup>46</sup> Some chicken processors have allegedly resorted to direct collusion to maintain high prices for consumers (and low wages for workers) and faced criminal prosecution and private lawsuits over this conduct.<sup>47</sup>

By allowing corporations to accumulate pricing power through consolidation, federal merger policy has contributed to the current inflation. Businesses have extraordinary pricing power and can pass higher costs (and more) along to consumers. With greater price competition, they would be more likely to bear higher costs in the form of lower margins and lower profits.

Indeed, inflation can provide a useful cover for exercises of corporate pricing power that would otherwise trigger strong opposition from customers and the public. If inflation is treated as a general increase in prices, corporate price increases may be portrayed as only keeping up with an economy-wide phenomenon.<sup>48</sup> Executives can point to supposedly higher input costs and insist that they are simply passing them along to purchasers and end consumers, asserting they are following the general inflationary trend rather than helping instigate it.<sup>49</sup> A CFO of a supplier to food companies told the Wall Street Journal, “Widespread inflation makes it easier to broach the topic of raising prices with customers.”<sup>50</sup>

### III. Another Link Between Weak Anti-Merger Policy and Inflation: Eroding the National Industrial Base and Productive Capacity

Weak federal enforcement of anti-merger law has contributed to a lack of spare capacity in the economy. Mergers among competitors often lead to the elimination of “redundant” plants, facilities, and offices. In addition, permissive merger policy has encouraged businesses to grow through mergers and acquisitions instead of through investment in new production.

Mergers are (in)famous for leading to plant closures and layoffs. Following a merger between two firms, especially rivals, the newly enlarged corporation often closes plants, facilities, and offices that are duplicative and not necessary to meet demand. One analysis found that “roughly 30% of employees are deemed redundant after a merger or acquisition in the same industry.”<sup>51</sup> This elimination of redundancies can reduce costs and generate greater cash flow for the corporation in the near term, which is an attractive proposition for executives and shareholders

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<sup>46</sup> Goodman, *supra* note 43; Fed. Reserve Bank of Dallas, Go Figure: What’s Driving Wide Gap Between Cattle and Beef Prices? (2017), <https://www.dallasfed.org/~media/documents/research/swe/2017/swe1702.pdf>.

<sup>47</sup> Press Release, Dep’t of Justice, Four Executives and Company Charged with Price Fixing in Ongoing Investigation into Broiler Chicken Industry (July 29, 2021), <https://www.justice.gov/opa/pr/four-executives-and-company-charged-price-fixing-ongoing-investigation-broiler-chicken>; Mike Leonard, *Tyson Has Tentative Deal to Exit Chicken Farmer Wage-Fixing Suit*, BLOOMBERG LAW, June 15, 2021, <https://news.bloomberglaw.com/antitrust/tyson-has-tentative-deal-to-exit-chicken-farmer-wage-fixing-suit>; Claire Kelloway, *U.S. Food Prices Are Up. Are the Food Corporations to Blame for Taking Advantage?*, TIME, Jan. 14, 2022, <https://time.com/6139127/u-s-food-prices-monopoly/>.

<sup>48</sup> John Nichols, *The Dirty Secret of Inflation: Corporations Are Jacking Up Prices and Profits*, NATION, Feb. 21, 2022, <https://www.thenation.com/article/politics/inflation-price-gouging/>.

<sup>49</sup> Hal Singer, *Antitrust Should Be Used to Fight Inflation*, AM. PROSPECT, Feb. 2, 2022, <https://prospect.org/economy/antitrust-should-be-used-to-fight-inflation/>.

<sup>50</sup> Broughton & Francis, *supra* note 1.

<sup>51</sup> Mitchell Lee Markets, Philip Mirvis & Ron Ashkenas, *Surviving M&A*, HARV. BUS. REV. (March-Apr. 2017), <https://hbr.org/2017/03/surviving-ma>.

with a short-term orientation. It, however, means the corporation has less productive slack to meet increases in demand. At an aggregate level, consolidation strips the United States of vital productive capacity.

Hospital consolidation illustrates the social costs of merger activity. In metropolitan areas and counties across the country, hospitals in the past few decades have gone on a merger and acquisition frenzy, concentrated local healthcare markets, and obtained extraordinary power over patients and payors.<sup>52</sup> In the course of consolidation, they have also closed hospitals and clinics that they deemed superfluous. Due in part to this consolidation, the United States had fewer hospital beds in 2017 (900,000) than it did in 1975 (1.5 million),<sup>53</sup> even though the population of the country had increased by more than 100 million during that period. As a result, the nation was much less equipped to respond to the pandemic and the surge in Americans needing hospital care.

Permissive merger policy also channels corporate strategy away from investment and innovation. Why should executives undertake the challenge of building new plants and facilities and entering new markets using their own knowhow and resources when mergers and acquisitions offer an easier method of growth? In 1987, the economists Walter Adams and James Brock captured the opportunity cost of practically unchecked merger activity:

[M]anagement attention has been diverted from the critical task of investing in *new* plants, *new* products, and state-of-the-art manufacturing techniques. Billions of dollars spent on shuffling ownership shares are, at the same time, billions of dollars *not* spent on productivity-enhancing plant, equipment, and research and development. The millions of dollars absorbed in legal fees and investment banking commissions are, at the same time, millions of dollars not plowed directly into the nation's industrial base. The opportunity costs of merger mania are real. And they bode ill for the reindustrialization of America.<sup>54</sup>

To put the amount of merger activity in perspective, the value of mergers and acquisitions between 1985 and 2008 was more than four times greater than the amount of private spending on research and development during that period.<sup>55</sup>

The turn to mergers and acquisitions reflects the broader financialization of corporate governance. Many corporations aim to disburse as much money as possible to shareholders through dividends, stock buybacks, and mergers and acquisitions (when paid for with cash),<sup>56</sup>

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<sup>52</sup> MARTIN GAYNOR, HAMILTON PROJECT: WHAT TO DO ABOUT HEALTH-CARE MARKETS? POLICIES TO MAKE HEALTH-CARE MARKETS WORK 8-9, 13-14 (2020), [https://www.brookings.edu/wp-content/uploads/2020/03/Gaynor\\_PP\\_FINAL.pdf](https://www.brookings.edu/wp-content/uploads/2020/03/Gaynor_PP_FINAL.pdf).

<sup>53</sup> Andrew Flynn & Ron Knox, *We're Short on Hospital Beds Because Washington Let Too Many Hospitals Merge*, WASH. POST, Apr. 8, 2020, <https://www.washingtonpost.com/outlook/2020/04/08/were-short-hospital-beds-because-washington-let-too-many-hospitals-merge/>.

<sup>54</sup> Walter Adams & James W. Brock, *The Proposed Emasculation of Section 7 of the Clayton Act*, 65 NEB. L. REV. 813, 819 (1986) (emphases in original).

<sup>55</sup> James W. Brock, *Economic Concentration and Economic Power: John Flynn and a Quarter-Century of Mergers*, 56 ANTITRUST BULL. 681, 683 (2011).

<sup>56</sup> J.W. Mason, *Acquisitions as Corporate Money Hose*, Sep. 26, 2018, <https://jwmason.org/slackwire/acquisitions-as-corporate-money-hose/>.



instead of investing in capacity and undertaking research and development. For example, Intel, which was once a global leader in semiconductor chip development, has focused in recent times on protecting its monopoly in chips for personal computers and servers and distributing profits to shareholders, while its foreign rivals Samsung and TSMC have concentrated on capital expenditures and innovation and become leaders in the growing markets for smartphone and tablet chips.<sup>57</sup>

These two effects of weak anti-merger enforcement mean the United States has a smaller industrial base and less productive capacity than it would otherwise. Less capacity—and critically less spare capacity—makes firms less capable of responding to even modest increases in demand. What executives, investment bankers, and short-termist shareholders disparage as “redundant” or “unnecessary” plants, facilities, and equipment can be vital for economic resiliency.

#### IV. Conclusion

Lax merger policy has contributed to present inflation. By allowing virtually unchecked consolidation across the economy, the DOJ and the FTC have permitted corporations to accumulate extraordinary pricing power. They can unilaterally and jointly raise prices for many goods and services. Just as importantly, a permissive approach to corporate mergers has encouraged the elimination of spare productive capacity and discouraged investment in new plant, equipment, and facilities, which are especially important during times of crisis when demand for certain products may surge.

Strengthening anti-merger policy can serve as a useful anti-inflation tool going forward. It can constrain corporate pricing power and encourage investment in the industrial base, instead of the zero-sum game of buying, combining, and swapping existing business assets. Congress should enact new anti-merger law that cracks down on corporate consolidation and channels corporate strategy in socially beneficial directions. In the meantime, the Biden administration has taken preliminary steps to breathe new life into federal anti-merger law, most notably by opening a broad review of the DOJ/FTC merger guidelines.<sup>58</sup> Paired with investigating collusive behavior by powerful corporations and unwinding harmful past mergers in industries such as meatpacking, strong federal anti-merger law can play an important role in containing inflation.

Thank you for your time.

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<sup>57</sup> Garphil Julien, *To Fix the Supply Chain Mess, Take on Wall Street*, WASH. MONTHLY, Jan. 17, 2022, <https://washingtonmonthly.com/2022/01/17/to-fix-the-supply-chain-mess-take-on-wall-street/>.

<sup>58</sup> Press Release, Fed. Trade Comm’n, Federal Trade Commission and Justice Department Seek to Strengthen Enforcement Against Illegal Mergers (Jan. 18, 2022), <https://www.ftc.gov/news-events/press-releases/2022/01/ftc-and-justice-department-seek-to-strengthen-enforcement-against-illegal-mergers>.